Dato' Seri Anwar Ibrahim v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL JURISDICTION NOS W–Q5–64 OF 2000 AND W–05–65 OF 1999
PS GILL FCJ, RICHARD MALANJUM AND HASHIM YUSOFF JJCA
21 JANUARY 2004

Criminal Procedure — Bail — Granting of — Guidelines for exercise of discretion — Medical condition — Length of sentence — Whether applicants first offenders — Whether 'exceptional circumstances' shown

Criminal Procedure — Sentence — Stay of execution pending appeal — Gravity of offence — Whether existed distinction between pre-conviction and post-conviction application for bail

This was an application by the first and second applicants for stay of execution of the custodial sentences imposed upon them pending their appeals to the Federal Court. Among the reasons given for the first applicant, the main grounds were, inter alia: (a) that there was still the presumption of innocence even after conviction in view of further appeal to the Federal Court; (b) it was the court's discretion to grant bail pending appeal and special or exceptional circumstances have been shown; (c) that the offence upon which the first applicant was convicted is a bailable offence; (d) that the period of waiting for the hearing of the appeal in the Federal Court should be considered; (e) that there were merits in the appeal to the Federal Court on points of law; (f) the first applicant was a first offender since there was a pending application for the review of his first conviction on another offence; (g) that the first applicant is under treatment, thus mercy should be shown to him; (h) that his release would facilitate the giving of instruction by him to his solicitors. As for the second applicant's application for stay of execution, it is premised on two main grounds, namely, that he was on bail prior to the decision of this court and it was only a bare assertion by the respondent that he might abscond. The public prosecutor submitted, inter alia: (a) the applications by the applicants were for stay of execution and not just any ordinary bail applications, (b) that there was no reply to the assertions in the medical report of the first applicant; (c) that the record showed the frequency of visits to the first applicant, and there was no denial of visits to his lawyers; (d) that it was for the Federal Court to consider an application for stay and not this court (e) that it was for the applicants to show obvious defect on the face of the record or critical errors of law, and a mere assertion of good grounds to appeal was insufficient; and (f) that it must be shown that there were new and compelling or special reasons to grant bail and a mere assertion that the applicants may succeed in their appeals was not a special reason.

Held, dismissing the first and second applicants' applications:

(1) The critical factor the applicants must show reasonably to the satisfaction of the court was that their cases came within the 'exceptional circumstances' category. The medical condition of the first applicant did not meet the test of 'exceptional circumstances' so as to warrant the granting of bail

pending the disposal of his appeal. In fact, there was no assertion or any medical evidence produced to show that the continuous incarceration of the first applicant has or was the cause of his further injuries as alleged (see paras 33, 38).

(2) On the assertion that there were merits in the first applicant's appeal to the Federal Court' the court should not delve into the substratum of the complaints ventilated against its own judgment. To do so would tantamount to reviewing its own decision. Since the first applicant had already filed his appeal to the Federal Court, the process should be allowed to take its own course (see para 39).

(3) Though the gravity of the offence may be a factor to take into account, a distinction should be made between pre-conviction and post-conviction application for bail. The latter does not allow a convict to benefit from the presumption of innocence. Instead, a conviction resulting from a trial must be taken, until the contrary be shown, to have been properly conducted and without error of law (see para 42).

(4) Taking into account the length of sentence imposed on the first applicant, a waiting period of six months to one year for the appeal to be heard in our view could not be considered as unreasonable (see para 44).

(5) The first applicant in fact had been convicted and had served his sentence on another offence. He did not have the benefit of being a first offender, although there was a pending application for the first conviction to be reviewed by the Federal Court. As long as there was no order to the contrary, the conviction stood as a record against him (see paras 45–46).

(6) As regards the application by the second applicant, the second applicant had failed to demonstrate reasonably that his case was within the category of 'special or exceptional circumstances' which warranted his release on bail pending appeal (see para 53).

[**Bahasa Malaysia summary**

Ini adalah permohonan oleh pemohon-pemohon pertama dan kedua untuk satu penangguhan pelaksanaan hukuman tahanan ke atas mereka sementara menunggu rayuan mereka ke Mahkamah Persekutuan. Di antara alasan-alasan yang diberi untuk pemohon pertama adalah: (a) masih terdapat anggapan tidak bersalah selepas disabit memandangkan rayuan seterusnya ke Mahkamah Persekutuan; (b) ia adalah budi bicara mahkamah untuk memberi ikat jamin sementara rayuan dan keadaan yang khas telah ditunjukkan; (c) kesalahan yang mana pemohon pertama disabit merupakan kesalahan yang boleh diikat jamin; (d) tempoh menunggu pendengaran rayuan diMahkamah Persekutuan patut dipertimbangkan; (e) terdapat merit-merit didalam rayuan ke Mahkamah Persekutuan pada undang-undang; (f) pemohon pertama merupakan pesalah pertama memandangkan terdapat kajian semula sabitan pertama beliau pada kesalahan lain; (g) pemohon pertama masih dirawat dan oleh itu belas kasihan patut diberi kepadanya; (h) pembebasan beliau akan membolehkan pemohon pertama memberi arahan kepada peguamnya. Mengenai pemohonan

pemohon kedua untuk penangguhan pelaksanaan, ia dipremiskan pada dua alasan, iaitu, beliau telah diikat jamin sebelum keputusan mahkamah ini dan hanya satu kenyataan sahaja oleh responden menyatakan beliau mungkin melarikan diri. Pendakwa Raya telah menyatakan, antara lain, (a) permohonan pemohon-pemohon itu adalah untuk penangguhan pelanksanaan dan bukan permohonan untuk ikat jamin; (b) tidak terdapat jawapan kepada hujuhan di dalam laporan perubatan pemohon pertama; (c) rekod-rekod menunjukkan terdapat lawatan kerap ke pemohon pertama, dan tidak terdapat penafian melawat peguam beliau; (d) Mahkamah Persekutuan akan mempertimbangkan permohonan-permohonan untuk penangguhan pelaksanaan dan bukan mahkamah ini; (e) adalah untuk pemohon-pemohon menunjukkan kecacatan yang ketara pada rekod atau kekhilafan undang-undang, dan hujuhan-hujuhan terdapat alasan-alasan baik tidak mencukupi; dan (f) mesti ditunjukkan bahawa terdapat alasan-alasan yang baru atau mendorong atau keadaan-keadaan khas untuk memberi ikat jamin dan hujuhan bahawa pemohon-pemohon mungkin akan berjaya di dalam rayuan mereka bukan keadaan khas.

Diputuskan, menolak permohonan-permohonan pertama dan kedua pemohon-pemohon:

(1) Faktor yang penting yang pemohon-pemohon mesti tunjukkan kepada kepuasan mahkamah adalah kes-kes mereka termasuk kategori 'exceptional circumstances'. Keadaan perubatan pemohon pertama tidak memenuhi keperluan 'exceptional circumstances' untuk membolehkan ikat jamin diberi sementara menunggu penyelesaian rayuan itu. Pada hakikatnya tidak terdapat hujuhan ataupun keterangan perubatan yang dikemukakan untuk menunjuk tahanan berterusan pemohon pertama telah menyebabkan kecederaan kepada beliau seperti yang dikatakan (lihat perenggan-perenggan 33, 38).

(2) Pada hujahan bahawa terdapat merit-merit di dalam rayuan pemohon pertama kepada Mahkamah Persekutuan, Mahkamah tidak berpendapat bahawa mahkamah patut meneliti aduan terhadap keputusannya sendiri. Jika demikian, ini seperti mengkaji semula keputusan mahkamah ini sendiri. Memandangkan bahawa pemohon pertama telah memfailkan rayuannya kepada Mahkamah Persekutuan, proses itu patut dibenarkan berterusan (lihat perenggan 39).

(3) Walaupun keseriusan kesalahan itu mungkin menjadi satu faktor untuk dipertimbangkan satu perbezaan patut dibuat di antara ikat jamin sebelum sabitan dan selepas sabitan. Permohonan selepas sabitan tidak memberi anggapan tidak bersalah kepada tertuduh. Satu sabitan daripada perbicaraan mesti diambil, sehingga sebaliknya ditunjukkan dijalankan dengan betul dan tanpa kekhilafan undang-undang (lihat perenggan 42).

(4) Mempertimbangkan tempoh hukuman yang dijatuhkan ke atas pemohon pertama, tempoh selama enam bulan hingga satu tahun untuk rayuan ini didengar, pada pandangan mahkamah adalah munasabah (lihat perenggan 44).

(5) Pemohon pertama telah disabit dan telahpun menjalani hukumannya untuk kesalahan lain. Beliau bukan pesalah pertama, walaupun terdapat permohonan yang masih belum diselesaikan untuk kesalahan pertamanya dikaji semula oleh Mahkamah Persekutuan. Selagi tiada perintah sebaliknya, sabitan itu menjadi rekod terhadapnya (lihat perenggan-perenggan 45–46).

(6) Mengenai permohonan oleh pemohon kedua, pemohon kedua telah gagal menunjukkan dengan munasabah bahawa kes beliau termasuk kategori 'special or exceptional circumstances' yang membolehkan pembebasan beliau sementara rayuan beliau (lihat perenggan 53).]

Notes

For cases on granting of bail, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 697–719.

For cases on stay of execution pending appeal, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3498–3500.

Cases referred to

Ahani v The Attorney General of Canada 2002 ACWSJ LEXIS 335 (refd)
Ganesan v PP [1983] 2 MLJ 369 (refd)
Hanson and Anor v the Director of Public Prosecutor (Queensland) (2003, unreported) (refd)
KWK (A Child) v PP [2003] 4 MLJ 479 (refd)
Kwan Wah Yip & Anor, Re [1954] MLJ 146 (refd)
Queen v Lee Hoi Kwong, The 1993 HKCU LEXIS 390 (refd)
R v Farinacci 1993 WCBJ LEXIS 11345 (refd)
R v Giordano (1982) 1 SASR 241 (refd)
Regina v Wilson (1994) 34 NSWLR 1 (refd)
Sharma Kumari a/p Oam Parkash v PP [2000] 6 MLJ 847 (refd)

Appeal from: Criminal Application Nos 45–51 of 1998 and 45–26 of 1998 (High Court, Kuala Lumpur)

Karpal Singh (Christopher Fernando, Pawan Chik Merican, Zulkifli Nordin, SN Nair and Saiful I zam with him) (SN Nair) for the first applicant.
Gobind Singh Deo (Jagdeep Singh Deo and Ram Karpal Singh with him) (Karpal Singh & Co) for the second applicant.
Attorney General Malaysia (Dato' Mohd Yusof bin Zainal Abiden, Senior Deputy Public Prosecutor, Tun Abdul Majid bin Tun Hamzah, DPP, Mohd Hanafiah, DPP) (Attorney General's Chambers) for the respondent.

PS Gill FCJ (delivering judgment of the court):

[1] Before us are notices of motion (encls 46a and 14a) both dated 22April 2003 filed by the first and second applicants respectively.

[2] On 18 April 2003, by a unanimous decision, we dismissed the appeals of both the applicants against their respective convictions and sentences.

[3] Before the court had arisen for the day, oral applications were made on their behalves for stay of execution of the sentences imposed. But after hearing the arguments from the learned public prosecutor and the learned counsel for the applicants, we intimated that formal applications for stay of execution should be filed. That request was accordingly complied with, thus filed together with supporting affidavits. Opposing affidavits were also filed by the respondent.

[4] We first heard the applications jointly on 9 May 2003 but it could not continue as we were informed that the first applicant required time to arrange for his daughter's wedding. We obliged and adjourned the proceeding to a later date.

[5] On 14 July 2003, we resumed hearing. However, the proceeding could not go on as Mr Karpal Singh was hospitalized. We therefore adjourned the hearing to 22 July 2003.

[6] The submissions continued in earnest for two consecutive days, on 22 July 2003 and 23 July 2003 and at the end of the hearing we reserved our decision.

[7] However, having prepared our draft judgment and before we could deliver it, the first applicant, on 14 October 2003, filed an application for review by us of our main decision rendered on 18 April 2003. There was also an application for further argument on the applications for stay of execution.

[8] Hence, on 8 December 2003, we agreed to hear further submissions on the applications for stay and thereafter reserved our judgment.

[9] But even on 19 January 2004 when we resumed hearing on the application for review of our main decision, submissions were still made on the applications for stay.

[10] We have to lay out the chronological events related to the applications for stay to dispel any notion that this court unjustifiably delayed its decision.

[11] Now, this is our judgment in respect of the applications for stay of execution.

[12] The main prayer of both the applicants is for stay of execution of the custodial sentences imposed upon them respectively by the High Court and affirmed by this court. In short, they want bail pending their appeals to the Federal Court.

[13] For the first applicant, the following reasons were given in support of his application, inter alia:

(i) that there is still the presumption of innocence even after conviction in view of further appeal to the Federal Court and that the conviction is conditional;

(ii) that it is the discretion of this court to grant bail pending appeal and special or exceptional circumstances have been shown particularly the fact that the first applicant is sick;

(iii) that it was for the respondent to show why bail should not be granted by way of rebuttal to the affidavits filed by the first applicant;

(iv) that there was no evidence shown that the first applicant has the tendency of committing any violation of the law if released;

(v) that the offence upon which the first applicant is convicted is a bailable offence;

(vi) that the period of waiting for the hearing of the appeal in the Federal Court should be considered. In this case, the hearing will not be fixed early since there are also other pending appeals in that court and that there is nothing special in this case to warrant an urgent hearing;

(vii) that there are merits in the appeal to the Federal Court on points of law such as the issue of notice of alibi, the evidence of Azizan and Musa;

(viii) that the first applicant is a first offender since there is a pending application for the review of his first conviction on another offence;

(ix) that the changes in the dates of the charge should be considered and not the conviction;

(x) that there is no reason for the first applicant to abscond and there is no averment to the contradict such assertion;

(xi) that the first applicant is under treatment, thus mercy should be shown to him;

(xii) that his release will facilitate the giving of instruction by him to his solicitors. Presently, to see him would entail seeking permission from the Superintendent of Prison;

(xiii) that his family misses him; and

(xiv) that the first applicant can even be released with conditions including house arrest.

[14] Further reasons advanced by the first applicant are, inter alia:

(a) that there is no difficult point of law involved; and

(b) that in the grounds of judgment of this court there is a serious misdirection on the issue of notice of alibi.

[15] In respect of the application by the second applicant, the reasons given are thus:

(i) that it is only a bare assertion by the respondent that the second applicant would abscond;

(ii) that the second applicant has been on bail since his conviction and he has been attending court hearings without fail. The present application is just an extension of his earlier bail;

(iii) that his appeal would succeed on the issue of alibi alone;

(iv) that the case against the second applicant should be distinguished from that of the first applicant in that for the latter there was political consideration;

(v) that the second applicant is not in the position to cause any unrest;

(vi) that the offences are not serious and he has served four years of the six years sentence;

(vii) that there is no reason for the respondent to object to the application for bail; and

(viii) that the error in the issue of the notice of alibi in respect of the first applicant affected the second applicant since it was a joint trial.

[16] In response, the learned public prosecutor submitted, inter alia:

(a) that the applications by the applicants are for stay of execution and not just any ordinary bail applications. There is also a difference between application for bail before and after conviction. It is for the applicants to satisfy the court reasonably that stay of execution should be allowed;

(b) that there was no reply to the assertions in the medical report of the first applicant;

(c) that the record shows the frequency of visits to the first applicant, and there was no denial of visits to his lawyers. The complaint is only on the inconvenience but that is not an issue;

(d) that this court has no jurisdiction to hear an application for stay. It is for the Federal Court to consider;

(e) that it is for the applicants to show obvious defect on the face of the record or critical error of law, and mere assertion of good grounds to appeal is insufficient; and

(f) that it must be shown that there are new and compelling or special reasons, to grant bail and mere assertion that the applicants may succeed in their appeals is not a special reason.

[17] In considering the matter before us, we note the following:

(i) that these applications are in fact for stay of execution pending appeal; and

(ii) that it is a matter of discretion to be exercised judiciously.

[18] Guidance may also be found from the decisions of our courts as well as from other common law jurisdictions. In *Re Kwan Wah Yip & Anor* [1954] MLJ 146, Spencer Wilkinson J had this to say on the approach to be adopted when considering an application for stay after a trial. At p 147, he said:

> Entirely different considerations arise after trial and in my opinion once a person has been convicted by a Court of competent jurisdiction it must be assumed, in the absence of any obvious defect on the face of the record, that he has been rightly convicted unless and until the conviction is set aside.

[19] Hence, it implies that once a person is convicted he is expected to serve forthwith the sentence imposed upon him. The question therefore is: under what circumstances a stay of execution is granted? There are of course some punishments where stay is automatic, pending appeal, for instance, a sentence of whipping.

[20] In *Blackstone's Criminal Practice* (1991) at p 1436, it stated:

> The approach of the Court of Appeal to applications for bail pending appeal has been consistently cautious. The general principle was stated in *Watton* (1978) 68Cr ADD R 293, namely, that bail should be granted only if the court can answer in the affirmative the question: *Are there exceptional circumstances which would drive the court to the conclusion that justice can only be done by the granting of bail?* The fact that the single judge gives the applicant leave to appeal against conviction does not of itself lead to the conclusion that bail should also be granted. If, however, the grounds of appeal are *prima facie very strong, that is an argument for the court, in its discretion, allowing bail. Similarly, the time that will elapse before the appeal can be determined coupled with the length of whatever custodial sentence was imposed on the applicant are relevant factors. However, there is no general rule that an applicant given a short custodial sentence should be bailed pending appeal.* One reason for the court's reluctance to bail applicants is that, should the appeal ultimately fail, the applicant is likely to be returned to prison to serve the remainder of his sentence, and even a long delay between his release on bail and the determination of the appeal cannot be relied on as a reason for not adopting that course. (Emphasis added.)

[21] In *R v Farinacci* 1993 WCBJ LEXIS 11345, the Ontario Court of Appeal (Canada) opined that after 'a conviction, there was no presumption left, one way or the other, but only an enforceable finding of guilt. The appellate process, which contained its own due process requirements, was not required to treat guilt as an open question. The notion of bail pending appeal was not perceived as resting on a presumption of innocence, even though the possibility that the appeal may ultimately lead to an acquittal was a prerequisite to any logical entitlement to bail. It could not be said that the entitlement to bail pending appeal should be the same as the entitlement to bail before trial, provided only that it be shown that an appeal was not frivolous ... . Public confidence in the administration of justice required that judgments be enforced, and the public interest may require that a person convicted of a very serious offence, particularly a repeat offender advancing grounds of appeal that were arguable but weak, be denied bail.'

[22] And further in the case of *Ahani v The Attorney General of Canada* 2002 ACWSJ LEXIS 335 (Ontario [Canada] Court of Appeal), it was held that 'there is no automatic right to bail pending appeal even if in the result the offender may have served the entire sentence before the appeal can be heard.'

[23] Moving to another jurisdiction (Australia) in the case of *Regina v Wilson* (1994) 34 NSWLR 1, Kirby P said that 'in an application for bail where a person after conviction stands for sentence it will require something more than an arguable point in the Court of Criminal Appeal to warrant the provision of bail upon the ground the application for bail is likely to succeed. The application must be most likely to succeed'. And Hunt CJ said that ... 'it has

to have an extraordinarily high prospect of success before a ground of appeal could even be considered on a bail'.

[24] And in *R v Giordano* (1982) 1 SASR 241 (Court of Criminal Appeal in South Australia) at p 242, King CJ said this:

> Before and during trial, the primary, although not the only, consideration is whether the applicant will appear when required to do so. This consideration has only a minor bearing on the grant of bail after conviction. Obviously bail after conviction would not be granted unless the circumstances were such as would have indicated bail before and during trial. After conviction, however, other cogent factors also came into consideration ... .There are practical reasons, moreover, why courts should exercise extreme caution to the grant of bail pending appeal. An appellant court does not sentence afresh in the light of circumstances which have changed since sentence was passed. It should not be placed in the invidious position, particularly of an appeal against sentence, of the dismissal of the appeal having the effect of returning to prison a person whose circumstances may have changed greatly during period of liberty on bail pending appeal. There is a serious risk of availability of bail leading to a proliferation of unmeritorious appeals thereby adding to the strains on the system of justice. Persons undergoing punishment in custody are prone to seize any opportunity to secure release, perhaps leaving the future to take care of itself. Appeals would be launched, irrespective of the prospects of success, simply in order to secure release, or perhaps with a view to creating situations which would tend to frustrate justice by making it difficult to return the appellant to prison.

[25] In fact, quite recently the High Court of Australia in the case of *Hanson and Anor v the Director of Public Prosecutor* (Queensland) (2003) (unreported) refused bail pending appeal since any finding based on the contention by the applicant that there were merits in her pending appeal against conviction and sentence would be premature without the benefit of full argument on the substantive appeal. It was also held that such contention did not 'demonstrate special or exceptional circumstances of the kind which would lead to a grant of bail' at that stage.

[26] In relation to period of waiting for appeal to be heard, Bokhary JA of the Hong Kong Court of Appeal in the case of *The Queen v Lee Hoi Kwong* 1993 HKCU LEXIS 390 expressed a view that 'it is not to be supposed that bail pending appeal was inevitable or even highly likely in all cases of short sentences notwithstanding that the time before which an appeal can be determined may well approximate the length of the sentence concerned'.

[27] Accordingly, based on the foregoing cases the principles of law expounded as guidelines in the exercise of discretion when considering an application for bail pending appeal may be briefly summarized thus:

(a) that the presumption of innocence is no longer a factor to consider;

(b) that the factors to consider differ from that of pre-conviction application for bail;

(c) that attendance in court is only a minor consideration;

(d) that the time lapse before the appeal can be determined in relation to the length of sentence imposed is a relevant factor. But there is no general

rule to say that an applicant with short custodial sentence should be automatically given bail. In appropriate cases, bail may be refused even if it means that the sentence will be served before the appeal is heard;

(e) that it is crucial for an applicant to show the presence of exceptional circumstances which would drive the court to conclude that justice can only be done if bail is granted;

(f) that where reliance is placed on proposed grounds of appeal, they must be prima facie very strong or extraordinarily high prospect of success;

(g) that public confidence in the administration of justice requires that judgment should be enforced, hence a person convicted of a serious offence, particularly a repeated offender, should be denied bail;

(h) that an appellate court should not be put in an awkward situation of having to return a convict upon dismissal of his appeal to prison to serve his sentence when his circumstances might have drastically changed while he is out on bail. Or he might have created a situation whereby it will be difficult to return him to prison upon dismissal of his appeal and thus frustrate justice; and

(i) that by making bail readily available after conviction it will encourage the proliferation of unmeritorious appeals.

[28] Having noted the foregoing views, we are also mindful of what was said in *Kwan Wah Yip* at pp 147–148:

> The Deputy Public Prosecutor cited certain English authorities with regard to the granting of bail in England pending appeal to the Court of Criminal Appeal, and it is quite clear that bail is only granted in England by that Court in exceptional circumstances. *I do not think, however, that quite the same considerations apply in regard to appeals from Subordinate Courts to the High Courts*, so that I do not think these authorities are of much assistance in dealing with the question now before me.
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> … … …
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> The considerations which I suggest should *guide the Subordinate Courts in granting or refusing bail pending appeal* in cases where a term of imprisonment has been imposed are the gravity or otherwise of the offence; the length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard; whether there are difficult points of law involved; whether the accused is a first offender or has previous convictions; the possibility of his becoming again involved in similar or other offences whilst at liberty; and whether the security imposed will ensure the attendance of the applicant before the appellate Court. (Emphasis added.)

[29] Subsequent decisions of our courts reflected similar approach. In *Sharma Kumari a/p Oam Parkash v Public Prosecutor* [2000] 6 MLJ 847, the learned High Court judge expressed his view thus (at p 853):

> … a stay of execution should not be granted and will not be granted by me unless there are special reasons for so doing, and the mere fact that a notice of appeal has been given is no sufficient reason. The only other reason given in this case is that the applicant who has been advised verily believes he has good reasons for appeal. That, also in my view does not constitute grounds for releasing an applicant pending appeal.

[30] In *Ganesan v Public Prosecutor* [1983] 2 MLJ 369, Mohamed Dzaiddin J (as he then was) said this at p 369:

> However, it has been stated on numerous occasions that the consideration which should guide the subordinate courts in granting or refusing bail pending appeal in cases where a term of imprisonment has been imposed are as follows:
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> (i) gravity or otherwise of the offence;
>
> (ii) the length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard;
>
> (iii) whether there are difficult points of law involved;
>
> (iv) whether the accused is a first offender or has previous conviction;
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> (v) whether the accused would become involved again in another offence whilst at liberty; and
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> (vi) whether the security imposed will ensure the attendance of the Applicant before the appellate court.

[31] Not so long ago, this court also had the opportunity to address such issue in the case of *KWK (A Child) v Public Prosecutor* [2003] 4 MLJ 479. And this is what the court said at p 488:

> Bail in the case of persons awaiting trial and in the case of persons after their conviction entail different considerations ... . As Ban J said in *R v Velevski* (2000) NSWCCA 445:
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> 'It has long been the common law (which is now excluded in this state by the Bail Act, s 67) that bail will not be granted to a person convicted of an offence pending the hearing of an appeal against his conviction unless special or exceptional circumstances are shown by him to exist. This is a recognition by the common law of the fact that the applicant for bail has already been tried and convicted and no longer has any presumption of innocence in his favour. The common law accepts that such conviction results from a trial which must be taken, until the contrary be shown, to have been properly conducted and without error of law; *R v Southgate* (1960) 78 WN (NSW) 44 at p 44. To grant bail pending an appeal from that conviction is to whittle away the finality of the jury's verdict and to invest it with a provisional quality, thus attacking the central feature in the administration of criminal justice: *Chamberlain v The Queen* (No 1) (1983) 153 CLR 514 at pp 519–520, The common law sees strong social reasons why an applicant's hopes should not be raised by the grant of bail for, if unsuccessful in his appeal, he will suffer all the more when those hopes are dashed and he is returned to custody to serve the sentence previously imposed upon him: *R v Grufjydd* (1972) 56 Cr App R 585 at p 589. There are also practical reasons for the common law's view that bail should be less readily available after conviction. These were referred to by King CJ in *R v Giordano* (1982) 31 SASR 241 at p 242; 6 A Crim R 397 at pp 398–399, and have been quoted by the Chief Justice in his judgment in the present application.'
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> Section 57 of the Courts of Judicature Act 1964 provides that an appeal shall not operate as a stay of execution though the court has a discretion to grant a stay. As the grant of a stay is only an exception to the general rule there must be special or exceptional circumstances before the discretion can be exercised in favour of an applicant. In commenting on proof of special circumstances Murray, Brooking and Vincent JJ said in *Re Clarkson* (1986) VR 583 at pp 584–585:

'In our view there is no difference between the approach of those who have spoken in terms of very exceptional circumstances and those who have referred only to special or exceptional circumstances. If the principle that special or exceptional circumstances must be shown to warrant admitting a prisoner to bail pending appeal is regarded as meaning only that the applicant bears a burden and must put forward, as justifying the grant of bail, something that is not present in most or all cases, then the statement of principle has failed adequately to convey the practice of the court and the principle on which it acts. It is probably for this reason that judges have on occasions expressed the requirement as one of "very" exceptional circumstances. The adverb reflects the difficulty of persuading the court that the circumstances put forward as special or exceptional are strong enough to overcome the powerful considerations of a general character which militate against the grant of bail pending appeal. So strong are these considerations that it has been said that extreme caution must be exercised before bail is granted: *R v Giordano* (1982) 31 SASR 241; *Re Maher* (unreported, Full Court of Queensland, 18 November 1985), Indeed in England the Court of Appeal has gone so far as to say that the application will succeed only if the court is driven to the conclusion that justice can only be done by the granting of bail: *R v Watton* (1978) 68 Cr App R 293, at p 297. The powerful considerations, relating principally, but not exclusively, to the public interest, which will ordinarily induce the court to refuse bail pending appeal have been examined in recent pronouncements of the Full Courts of South Australia and Queensland in *Giordano*' case and *Maker*'s case and by Brennan J in *Chamberlain v R (No I)* (1983) 153 CLR 514; 46 ALR 608, see further the observations of Sugarman J in *R v Southgate* (1961) 78 WN (NSW) 44, where his honour referred to the applicant's guilt as established by the verdict of a jury in what must be taken, until the contrary was shown, to have been a trial properly conducted and without error of law.'

The factors that may constitute special circumstances to justify the grant of a stay of execution after conviction are well settled (see, for example, *Re Kwan Wan Yip*; *Ganesan v Public Prosecutor* [1983] 2 MLJ 369; *Yusof bin Mohamed v Public Prosecutor* [1995] 3 MLJ 66; *Ralph v Public Prosecutor* [1972] 1 MLJ 242). They can be enumerated as follows:

(a) the gravity or otherwise of the offence;

(b) the length of the term of imprisonment; in comparison with the length of time which is likely to take for the appeal to be heard;

(c) whether there are difficult points of law involved;

(d) whether the accused is a first offender or has previous convictions;

(e) whether the accused would become involved again in another offence whilst at liberty;

(f) whether the security imposed will ensure the attendance of the applicant before the appellate court.

This list is not exhaustive (see *Goh Beow Yam v Reg* [1956] MLJ 251.

[32] With respect, we have no reason to disagree with the foregoing restatement of the guidelines as expounded by our courts with the caveat that the list is not exhaustive. Indeed, we have earlier on in this judgment alluded to some of the crucial guidelines considered by the courts in other common law jurisdictions.

[33] Bearing in mind the above guidelines in considering the matter before us, we are therefore of the view that the critical factor the applicants must show reasonably to our satisfaction is that their cases come within the 'exceptional circumstances' category.

[34] From the affidavits filed by and for the first applicant and the arguments of his learned counsel, it is clear that the main thrust is on his medical condition and that his appeal has merits particularly based on the assertion that there is a serious error on the face of the record in relation to the service of notice of alibi before the amendment to the charge preferred against him.

[35] In his submission on 9 January 2004, learned counsel for the first applicant re-emphasized that his client has been suffering and that recent medical examination indicated he had suffered further injuries and in dire need of medical attention.

[36] However, in the affidavit of the consultant physician in charge of the first applicant, Dr Jeyaindran a/l Sinnadurai affirmed on 6 May 2003, he deposed to that the first applicant declined all offers to have the surgery done locally. It was further deposed to, that a panel of consultants had reviewed the response of the first applicant to conservative treatment and was of the opinion that he responded well.

[37] As regards the statement from the Bar of the learned counsel, unsupported by any medical evidence produced, that the condition of the first applicant has worsened, we are inclined to agree with the learned public prosecutor that whilst such assertion is made, there is no allegation that nothing is being done by the authorities to deal with the problem.

[38] Accordingly, we are of the view that the medical condition of the first applicant does not meet the test of 'exceptional circumstances' so as to warrant the granting of bail pending the disposal of his appeal. In fact, there is no assertion or any medical evidence produced to show that the continuous incarceration of the first applicant has or is the cause of his further injuries as alleged.

[39] On the assertion that there are merits in his appeal to the Federal Court, with respect, we do not think we should delve into the substratum of the complaints ventilated against our own judgment. To do so would tantamount to reviewing our own decision. Since the first applicant has already filed his appeal to the Federal Court, the process should be allowed to take its own course.

[40] Incidentally, difficult point of law has not been considered as sufficient to 'demonstrate special or exceptional circumstances of the kind which would lead to a grant of bail' (see *Hanson v Director of Public Prosecutor*).

[41] It was also submitted that the offence for which the first applicant was convicted is not a serious offence as to justify the refusal of bail pending appeal.

[42] With respect, though the gravity of the offence may be a factor to take into account, distinction should be made between pre-conviction and post-conviction application for bail. The latter does not allow a convict to benefit the presumption of innocence. Instead, a conviction resulting from a trial must

be taken, until the contrary be shown, to have been properly conducted and without error of law (see *R v Velevski*).

[43] In the instant case, we do not think it can be plainly said that the offence is minor considering the maximum penalty provided for by the relevant statute. Hence, this factor does not favour the first applicant.

[44] As to when the appeals can be heard by the Federal Court that is within the purview of that court. But it is not in dispute that all papers have been filed and it is now only a matter of fixing the date of hearing. Meanwhile, taking into account the length of sentence imposed on the first applicant, a waiting period of six months to one year for the appeal to be heard in our view cannot be considered as unreasonable (see *The Queen v Lee Hoi Kwong*; *KWK (A Child) v Public Prosecutor*).

[45] One other factor that is unfavourable to the first applicant is the fact that he has been convicted and indeed has served his sentence on another offence. He does not have the benefit of being a first offender.

[46] No doubt it was contended that there is a pending application for the first conviction to be reviewed by the Federal Court. With respect, so long as there is no order to the contrary we are bound to accept the conviction to stand as a record against him.

[47] On the plea that the first applicant is missed by his family and that having him on bail would ease the difficulty of his solicitors having to seek permission from the Superintendent of Prison for every visit, we do not think these factors can be considered as special or exceptional circumstances. From the affidavit of Encik Mohd Husin bin Mohd Mastan, Deputy Superintendent of Prison, affirmed on 6 May 2003, it is clear that visits had been allowed to family members as well as to the solicitors and counsel of the first applicant. There is therefore no merit in the contention.

[48] We have also considered the other reasons advanced for the first applicant. However, we are of the view that there is no necessity for us to deal with them in greater details before coming to our decision. Irrespective of our findings on those reasons, we are unanimous in our conclusion that the first applicant has failed to demonstrate reasonably to our satisfaction that his case is within the category of 'special or exceptional circumstances' which warrants his release on bail pending appeal.

[49] As regards the application by the second applicant for stay of execution, it is premised on two main grounds, namely, that he was on bail prior to the decision of this court and it was only a bare assertion by the respondent that he might abscond.

[50] With respect, it was not properly addressed before us whether those reasons advanced could be said to be exceptional or special circumstances as to warrant the granting of bail to the second applicant.

[51] In any event, what we have alluded to when dealing with the application of the first applicant equally applies to the second applicant including the fact that he also has one previous conviction.

[52] The fact that he was on bail after the trial in the High Court should not be deemed a criterion for the grant of a stay of execution in an application before this court. If we accept such a preposition then we would be failing in our task of exercising our discretion judiciously.

[53] Accordingly and for the above reasons, we are therefore not satisfied that the first and second applicants have reasonably shown that their cases are within the special or exceptional circumstances category to entitle them to bail pending appeal.

[54] Hence, the respective notices of motion filed by the applicants are hereby dismissed.

Applicants' first and secong applications dismissed.

Reported by Sally Kee Seok Meng